Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, CENTER FOR MEDIA EDUCATION AND MEDIA ACCESS PROJECT

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SUMMARY

This long-awaited *Inquiry* arrives during the throes of a debate that has proceeded much too long without active Commission involvement. A full rulemaking proceeding on open access is needed now. These comments demonstrate that significant time and talent has been developed within the economic, legal, and policymaking communities on these issues. Examples abound from which open access principles and policies may be developed. The Commission must capitalize on these efforts immediately to avoid the harm that has already begun to set in as corporate actors make business plans and cement technology decisions through the purchase and installation of equipment and infrastructure.

Because this *Inquiry* does not analyze any of the significant material available to the Commission in the several proceedings before it considering the issue, Consumers Union, Consumer Federation of America, Center for Media Education and Media Access Project, ("CU, *et al.*") take this opportunity to provide Commission staff with a synthesis of our and others' pleadings available in the public domain or submitted thus far in other dockets to provide a sound footing upon which to develop proposed rules.

CU *et al.* shows that open access is a constitutionally mandated and socially-desirable policy goal for several reasons. Open access will:

- Serve First Amendment values—fostering citizens' ability to speak and to be heard— by preserving competition among independent content providers, including those providing and facilitating non-commercial and civic content.
- Preserve the innovation that is the hallmark of the Internet and encourage competition among various providers of technical high speed access services.
- Through competition among providers, preserve consumer choice in areas such as niche marketing and filtering objectionable content.

- Encourage deployment of competitive facilities to provide high speed Internet access.

The Commission must not forget that decisions with respect to the Internet must include consideration of First Amendment values. ***Essential to the value of the Internet is the ability of citizens to speak to one another, to be publishers and broadcasters as well as readers and listeners.*** Alone among federal agencies, the Federal Communications Commission has a unique statutory and constitutional obligation to preserve and promote diversity of viewpoints in the Nation's electronic media.

CU *et al.* also demonstrate that the recent federal court decision in Broward County holding an open access ordinance violated the cable operator's First Amendment rights is fundamentally flawed and does not bind the Commission's First Amendment analysis. It is not supported by law or fact, and unlikely to be adopted by other courts.

First Amendment fears are not unwarranted. The technology necessary to target and eliminate certain content has been developed, and will be used to alter citizens' ability to reach the content they both wish to find and to distribute. Equipment manufacturers have developed technology that is able to target specific content, to favor certain content and slow down access to disfavored content, regardless of whether a particular user types in a web site address he or she wishes to visit. Quality of Service controls it offers can be used to *restrict the incoming push broadcasts from competitors* as well as subscriber's outgoing access to the push information site *to discourage its use.* Although these technologies and features are not, of themselves, contrary to the public interest, they become so when these choices inherent in those technologies are foisted upon users without options to go elsewhere.

The *Inquiry* wrongly implies that the Commission's current inaction in the area of cable broadband open access is consistent with its historic decisions in the *Computer Inquiry* proceeding. ***While the FCC may believe such inaction simply continues its "unregulation" of the Internet, we should be clear that non-intervention constitutes instead a fundamental policy reversal.*** For thirty years the consistent FCC policy has been to foster competition, in particular cost-oriented access to essential local network facilities, and to promote an open network architecture.

Relying on AT&T's and AOL's own filings, CU *et al.* demonstrate the economic need for open access with respect to the cable industry. The key characteristics include: (1) vertical integration between access and content, (2) market power in related markets, (3) paucity of alternative facilities, (4) the essential nature of access, (5) a need to ensure openness in the design of the architecture of the network, (6) stimulation of investment by increasing services, (7) the high cost to consumers of switching technologies, (8) bundling of monopoly and competitive services.

CU *et al.* review and synthesize the suggestions we have submitted to the Commission that could be used as a basis for defining open access. These suggestions demonstrate that a highly complex understanding of the policy and regulatory elements necessary for open access have already been developed and are ready for full analysis in a rulemaking.

Finally, CU *et al.* critique what the Commission terms "market-based" open access initiatives. CU *et al.* are compelled to point out that none of the initiatives mentioned are "market based," rather each was the product of regulatory intervention. Relying on our prior analysis and that of ISPs who were offered Time Warner's term sheet, CU *et al.* show that so-called voluntary agreements are insufficient both substantively, and because without enforceable rights, the unaffiliated ISPs party to these agreements are unlikely to be able to compete vigorously for customers against the cable-

affiliated ISPs.

INTRODUCTION

This long-awaited *Inquiry* arrives during the throes of a debate that has proceeded much too long without active Commission involvement. It begins *two years* after first requests for the Commission to consider the important policy and legal questions arising from the advent of new high speed Internet access technology and the emergence of business and technological models that may undermine the very characteristics of the Internet that many Americans value.[1]

Ironically, despite the Commission's refusal to help resolve market-paralyzing uncertainty, the trend towards open access policies is rapidly gaining momentum. The evolution of open access has ***not*** occurred because the marketplace is forcing that outcome. Rather, private parties, federal courts, local municipalities, state regulatory bodies, and the Federal Trade Commission have been involved in unnecessary and time-consuming proceedings litigation while the FCC remained on the sidelines.

The Commission's inaction is not only damaging but perverse, as the it has insisted that a single federal policy should govern and because the FCC is the instrumentality best suited to analyze and implement policies that will assure that the Internet continues to foster free speech, technological innovation, and economic growth. The FCC has the power—and the duty—to intercede to mandate clear and enforceable non-discriminatory access to the cable platform

Unfortunately, the Commission's first solid steps in this area are not only late, but constitute a very limited beginning. Through initiating an Inquiry, the Commission ensures that another step, a Notice of Proposed Rules, must occur before it can take any binding action. In addition, this

[1] *See* attached lLetter from Cheryl A. Leanza and Andrew Jay Schwartzman, Media Access Project to Chairman William E. Kennard, Federal Communications Commission (September 15, 1998).

Inquiry does not analyze any of the significant material available to the Commission in the several proceedings before it considering the issue. Therefore, Consumers Union, Consumer Federation of America, Center for Media Education and Media Access Project, ("CU, *et al.*") take this opportunity to provide Commission staff with a review of our and others' pleadings available in the public domain or submitted thus far in other dockets to provide a sound footing upon which to develop proposed rules.

A full rulemaking proceeding on open access is needed now. These comments demonstrate that significant time and talent has matured within the economic, legal, and policymaking communities on these issues. Examples abound from which open access principles and policies may be developed. The Commission must capitalize on these efforts immediately to avoid the harm that has already begun to set in as corporate actors make business plans and cement technology decisions through the purchase and installation of equipment.

I. Open Access is a Constitutionally Dictated and Socially- Important Policy Goal [¶¶ 32-36].

In paragraphs 32-36, the Commission asks generally whether open access is a desirable policy goal, whether new future services will require open access, and whether the presence of competing local facilities sufficient to provide open access.

Open access is a desirable policy goal for several reasons. As elaborated upon below, open access will:

- Serve First Amendment values—fostering citizens' ability to speak and to be heard— by preserving competition among independent content providers, including those providing and facilitating non-commercial and civic content.
- Preserve the innovation that is the hallmark of the Internet and encourage competition among various providers of technical high speed access services.

- Through competition among providers, preserve consumer choice in areas such as niche marketing and filtering objectionable content.
- Encourage deployment of competitive facilities to provide high speed Internet access.

Adoption of open access policies will achieve these goals *without* heavy-handed government intervention. Opponents recognize Commission reluctance to involve itself in complex and heavy-handed regulatory schemes. They therefore argue that open access will require just such steps. In fact, the contrary is true. Only inattention to these goals, which constitute the bedrock of communications policy in the United States, will result in detailed regulations to break apart institutionalized technical and business practices. In the same way that structural safeguards allow us to achieve goals with a small amount of regulation, open access principles will operate with the least amount of governmental intervention.[2]

A. Open Access Will Serve First Amendment Values.

Totally absent from the Commission's *Inquiry* is a discussion of the value most unique to the Commissions jurisdiction and unique role in the regulatory regime. While the Commission asks about whether open access is necessary to achieve competitive and pro-consumer goals, *NOI* at ¶ 32, it does not ask about First Amendment values. The Federal Communications Commission, alone among federal agencies, has a unique statutory and constitutional obligation to preserve and promote diversity of viewpoints in the Nation's electronic media.[3]

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[2] *See* Lemley & Lessig, *Ex Parte* Filing, CS Docket 99-251 (filed Nov. 10, 1999) at ¶ 68.

[3] *See, e.g.*, 47 USC §257(b) (purposes of Communications Act include promoting "diversity of media voices"); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 §2(b)(1) (policy to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media"); *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct 1174 (1997) ("Federal policy ... has long favored preserving a

The Internet affirms the promise of combining the best attributes of traditional common carrier and media policy. As the Supreme Court has found, when granting Internet communications the highest protection under the Constitution,

> The Internet ... now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."

Reno v. ACLU, 521 U.S. 844, 845 (1997). ***Essential to the value of the Internet is the ability of citizens to speak to one another, to be publishers and broadcasters as well as readers and listeners.*** It is this unique characteristic that, up to this point, has freed it from the type of regulation necessary to preserve content diversity and civic discourse in other mass media. *See, e.g.,* 47 USC §§ 312(a)(7), 315 (political broadcasting obligation); 47 USC § 335 (direct broadcast satellite public interest set-aside and political broadcasting obligation); 47 USC §§ 531, 532 (cable PEG access and leased access). But without federal action, this unique characteristic will disappear. The Internet will become controlled, just as other media has been, not by government regulation, but by private corporate policies designed to favor content on the basis of financial agreements. *See generally,* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999) (arguing that software code and Internet architecture make public policy). Without intervention now, significantly more intrusive rules or legislation must almost certainly follow.

In language that appears prescient today, the Commission's open access policies of yesteryear withstood First Amendment challenge by the common carriers who opposed them, first by AT&T,

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multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 774 (1978); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 386-392 (1969).

see United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131,184-85 (D.D.C. 1982) *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983), and then from the Regional Bell Operating Companies, *see United States v. Western Electric Co., Inc.*, 673 F. Supp. 525, 585-86 (D.D.C. 1987). The court rejected these challenges, holding instead that ***absence*** of open access requirements would threaten the values of the First Amendment. *Western Electric*, 673 F. Supp. at 585-86. The findings of the court are as true today as they were then:

> That the ability for abuse exists as does the incentive, of that there can be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reactions to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among more obvious means of anti-competitive action in this regard are increases in the rates for those switched and private line services upon which Regional Company competitors depend while lower rates are maintained for Regional Company network services; manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.

Id. at 566.

For these reasons, the Court concluded that "[c]ontrol by one entity of both the content of information and the means of its transmission raises an obvious problem" that "enable [the network provider] to discriminate" and "thus pose a substantial threat to the First Amendment diversity principle." *Id.* at 586.

This reasoning applies with equal vigor to the next generation broadband Internet. Cable network providers have the same capacity and incentive to discriminate, and control by them of both content and conduit "raises an obvious problem." Only imposing an open access requirement can solve this problem, and protect the First Amendment principle of diversity.

This diversity of content and unlimited access must be preserved as we move from the narrowband Internet era into the broadband era. As explained by the Department of Justice and others, content that is usable and attractive when accessed over slow Internet connections will quickly become obsolete as new advanced content for high speed connections is developed.[4] The digital divide in the United States may soon come to have a new meaning—the divide between those who obtain the full benefits of broadband technology and those who must wait as they peer at increasingly bandwidth-intense applications through the narrow peephole of a traditional telephone line.

1. The Recent Broward County Decision's First Amendment Analysis is Flawed.

In October 2000, the United States District Court for the Southern District of Florida held that a Broward County, Florida ordinance requiring nondiscriminatory access to cable systems offering broadband services violated the cable operator's First Amendment rights. *Comcast Cable Vision v. Broward County*, Case No. 99-6934-Civ-Middlebrooks (November 8, 2000). This decision directly contradicts the United State District Court for Oregon, which held that a similar ordinance by the city of Portland did not violate the First Amendment. *AT&T Corp. v. City of Portland*, 43

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[4] In its consent decree with AT&T and MediaOne, the Justice Department found that:

> [M]any firms are developing content that will be particularly attractive to residential broadband consumers. ... broadband service allows customers to access content that contains much larger quantities of data, such as high quality "streaming" video and various forms of interactive entertainment. Much of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities.

United States v. AT&T and MediaOne, Amended Complaint, Case No. 1:00CV001176 (RCL), (D.C. Cir. May 26, 2000) at ¶ 22, available at www.usdoj.gov/atr/cases/f4800/4840.pdf ("*DOJ AT&T/MediaOne, Amended Complaint*").

F. Supp.2d 1146, 1154 (D.Ore 1999) *rev'd on other grounds* 216 F.3d 871 (9th Cir. 2000). It also contradicts the explicit findings of other courts, that similar access provision do not violate the First Amendment. *See, e.g., Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997) (requirement that cable operator "must carry" local programming); *Time Warner Entertainment Co., L.P. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) (channel occupancy limits, which require cable operator to carry unaffiliated programming).

In reaching its erroneous conclusion, the *Broward County* Court makes numerous misstatements of fact and law. For example, the opinion states that "In *Turner I* [*Turner Broadcasting v. FCC,* 512 U.S. 622 (1994)], the Supreme Court held that cable operators are generally entitled to the same First Amendment protection as the print media." Slip Op. at 21. This statement, given without citation, is simply false to fact. While the Supreme Court did hold that the standard applied to television broadcasters did not apply, the Court explicitly rejected the argument that cable operators are given the same protection as the print media, observing that "the First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas. *See Turner I*, 512 U.S. at 657.[5]

The *Broward County* court also supported its reasoning with dubious factual assertions contrary to the findings of other courts. For example, the court asserted that users would attribute

[5] Moreover, lower courts have consistently rejected the attempts of cable operators to limit *Turner* to its facts and require strict scrutiny for access regulations. *See, e.g., Time Warner v. United States*, 211 F.3d at 1317-18; *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 181-84 (D.C. Cir. 1995). In general, courts have frowned upon exclusivity agreements, such as those used to bar other ISPs from access to the cable plant. *See, e.g., Amsat Cable Ltd v. Cablevision of Connecticut L.P.*, 6 F.3d 867 (2nd Cir. 1993); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638?40 (11th Cir. 1990).

potentially offensive speech provided by an alternative ISP to the cable operator, and that all 5,000 ISPs in the country could potentially seek access to the cable operators system. *Broward County* Slip Op. at 23. This miscomprehends how the Internet works or what the ordinance required. Internet Access is not like a cable channel: some affirmative action on the part of the user is required to obtain content, including offensive content. *See Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2342-43 (1997). Given that the Internet subscriber must affirmatively chose an alternate ISP, and affirmatively seek objectionable content, it surpasses belief that the subscriber would then attribute any offensive content to the cable system operator. Furthermore, the cable operators have consistently maintained that they exercise no editorial role in limiting a user's access to content; just the opposite, cable operators have pledged not to discriminate against any outside content. *See City of Portland*, 43 F. Supp.2d at 1154; *In re Application of Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd 3160, 3206-07 (1999). Indeed, the only other district court to address the "forced speech" argument rejected it. *City of Portland*, 43 F. Supp.2d at 1154. *See generally* Harold Feld, "Whose Line Is It Anyway? The First Amendment and Cable Open Access," 8 Commlaw Conspectus 23 (2000).

If the Commission determines that the *Broward County* court is correct, it must abolish all other structural limitations on cable systems, many of which are far more intrusive and more likely to be mistaken for the speech of the cable system operator. For example, if open access unconstitutionally abridges a cable operators First Amendment rights, the channel occupancy limits must likewise fall. That the courts have upheld the constitutionality of the channel occupancy limits should likewise reassure the Commission that open access is similarly constitutionally acceptable.

Finally, the *Broward County* court's determination that open access must fail even under

intermediate scrutiny is flawed and does not bind the FCC. In the first instance, the court relied on FCC staff reports (which are not binding authority) as well as data (but not policy judgements) issued by the full Commission to draw its own conclusion that little harm is caused by closed cable Internet offerings. *Broward County,* Slip Op. at 25-26. Nothing prevents the agency from fully considering the policy questions at issue for the first time in this proceeding, using its predictive powers to determine that open access is necessary to preserve the diversity of voices on the Internet. *See, e.g., FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978) (wide latitude to revisit policies, impose structural rules and order divestitures, to further interests of diversity).[6]

In short, the recent decision in *Broward County* is not supported by law or fact, and unlikely to be adopted by other courts. The existence of this case should not dissuade the FCC from imposing an open access regime consistent with the long line of cases supporting structural rules and access requirements to promote diversity. *See Turner II, NCCB, Red Lion, NBC v. United States,* 329 U.S. 190 (1943).

2. Absent Open Access, Bandwidth Management Technology Combined with Financial Incentives Will Endanger the Free Flow of Ideas, Non-commercial, and Civic Content on the Internet.

The technology necessary to target and eliminate certain content has been developed, and will be used to alter citizens' ability to reach the content they both wish to find and to distribute. As described by CU *et al.* in a June 1999 letter to Chairman Kennard, equipment manufacturers have developed technology that is able to target specific content, to favor certain content and slow down

[6] CU *et al.* note that the *Broward County* Court also erred in regarding narrowband and broadband services as identical, despite the Justice Department's determination that the two constitute separate markets. *See In re Applications of MediaOne Group, Inc. and AT&T Corp.*, 15 FCC RCD 9816, 9866-67 (2000).

access to disfavored content, regardless of whether a particular user types in a web site address he or she wishes to visit. For example, a document used to market equipment made by Cisco Systems, states that the Quality of Service controls it offers can be used to:

> ***restrict the incoming push broadcasts [from competitors]*** as well as subscriber's outgoing access to the push information site ***to discourage its use. At the same time, you could promote and offer your own or partner's services with full-speed features to encourage adoption of your service,*** while increasing network efficiency.

Controlling Your Network - A Must for Cable Operators, Cisco Systems, 1999 at 5 (emphasis added) (cited in Letter From Jeffrey Chester, Center for Media Education, *et al.* to Chairman Kennard (July 29, 1999) ("*July 1999 Letter*") available at http://www.cme.org/press/kennard.html *(See Attached)*. Moreover, these controls can "isolate network traffic by the type of application, even down to specific brands, by the interface used, by the user type, and individual user identification, or by the site address." *Id.* These technologies allow cable operators to limit content from specific sites, by specific users, and to target specific content.[7] Another description of content control is available in Prof. Jerome H. Saltzer's unpublished paper "'Open Access' is Just the Tip of the Iceberg" (October 22, 1999) available at web.mit.edu/Saltzer/www/publications/openaccess.html.

Similarly, AT&T's policies have worked to disable users who wish to transmit high-volume content. As CU *et al.* explained in its July 1999 letter, AT&T's "ONAdvantage Upstream Enhancement," for example, will restrict members of the public rom uploading materials faster than 128 kbps when previously they could do so at speeds up to 1 Mbps. *July 1999 Letter* at 2.

These technologies and features are not, of themselves, contrary to the public interest. They

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[7] According to one influential commenter, "the trouble with this vision is it is not the Internet ..." Kevin Werbach, "The Architecture of the Internet 2.0" *Release 1.0* at 5 (Feb. 19, 1999) found at: www.edventure.com/release1/cable.html.

become so, however, when these choices inherent in those technologies are foisted upon users without options to go elsewhere. In such a case, the previously open, competitive, and diverse Internet becomes a limited-choice medium. Users become more like cable television viewers, hoping that their cable company will carry their favorite channel, despite the fact that without a financial link between their cable company and the content provider, such hope will likely remain futile.

Similarly, without enforceable open access, noncommercial Internet providers may well be eliminated. Hundreds of community "FreeNets" provide "access to information to everyone in the community."[8] In particular, FreeNets act as low-cost ISPs by purchasing connectivity from telephone companies and providing connections to individuals and social service groups for free or at cost, and maintain web pages for non-profits.

Without open access policies, FreeNets are unlikely to obtain high speed connectivity because FreeNets provide services that the cable industry might well perceive as directly competitive. In addition, FreeNets are not likely to be replaced in the commercial marketplace. FreeNets often offer information services—particularly of local interest—without "banner advertising" and merchandising offerings. Just as many citizens, especially parents, may prefer non-commercial radio or television to commercial offerings, they may prefer to access—or have their children access—local information sources that do not come bundled with ads providing "click through" access

[8] For a list of FreeNets nationally, *see* http://www.y4i.com/accessusa.html; *see also* "The Case for Community Networking," Oregon Public Network, Inc., http://www.opn.org/cn/ index.html.

to merchandise.[9]

B. Open Access Will Preserve the Innovation that is the Hallmark of the Internet and Encourage Competition Among Various Providers of High Speed Access Services.

CU *et al.* and many others have described the benefits to technical innovation that an open high speed Internet will bring. Specifically, as CU *et al.* noted in its Petition to Deny the AOL/Time Warner Merger, economists at Berkeley have described why the current Internet has been so productive:

> Open infrastructure policy fostered user-driven innovation. This meant that the principal sources of new ideas driving economic growth emerged from a long-term process of experimentation and learning, as business and consumer users iteratively adopted and shaped application of information technology and E-commerce.

Bar, *et al.* "Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm," E-conomy Working Paper No. 12 at 2 (Berkeley Roundtable on the International Economy August 1999) (footnotes omitted) found at: //e-conomy.berkeley.edu/publications/wp/ewp12.pdf. (cited in Consumers Union *et al. Petition to Deny AOL/Time Warner Merger,* CS Docket 00-30 (filed April 26, 2000) at 79 ("*Petition to Deny*")) They further explain:

> Diversity of experimentation and competition on an increasingly open network were key, since nobody could foresee what would eventually emerge as successful applications. Openness allowed many paths to be explored, not only those which phone companies, the infrastructure's monopoly owners, would have favored. Absent policy-mandated openness, the Regional Bell Operating Companies (RBOCs) and monopoly franchise CATV networks would certainly have explored only the paths of direct benefit to them. It is doubtful that without such policy-mandated openness

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[9] This discussion of the importance of Free Nets has been presented to two U.S. Courts of Appeal. *See* Amicus Curiae brief of Citizens Utility Board of Oregon, *et al.* in AT&T v. City of Portland, 9th Cir., Docket 99-35609 (filed Sept. 14, 1999), available at www.mediaaccess.org/filings/portlnd.pdf.; Amicus Curiae brief of Virginia Citizens Consumer Council, *et al.* in MediaOne v. County of Henrico, No. 00-1680 (L) (4th Cir. July 10, 2000) found at: www.mediaaccess.org/filings/henrico.pdf.

the Internet Revolution would have occurred.

Bar *et al.* at 8.

Similarly, in an *ex parte* filing at the Commission in the AT&T/MediaOne proceeding, Professors Lessig and Lemley state:

> The effect of these Internet design principles—including, but not exclusively, End-to-End—has been profound. By its design, the Internet has enabled an extraordinary creativity precisely because it has pushed creativity to the ends of the network. Rather than relying upon the creativity of a small group of innovators who work for the companies that control the network, the End-to-End design enables anyone with an Internet connection to design and implement a better way to use the Internet. By architecting the network to be neutral among uses, the Internet has created a competitive environment where innovators know that their inventions will be used if useful. By keeping the cost of innovation low, it has encouraged an extraordinary amount of innovation.

Lemley & Lessig at ¶ 21.

Lemley and Lessig describe the disincentives in detail:

> Innovators are less likely to invest in a market where a powerful actor has the power to behave strategically against it. Innovation in streaming technologies, for example, is less likely when a strategic actor can affect the selection of streaming technologies, against new, and competitive systems.

* * * *

> Whether, as a software designer, it makes sense to develop ... applications depends in part upon the likelihood that they could be deployed in broadband cable contexts. Under the End-to-End design of the Internet, this would not be a question. The network would carry everything; the choice about use would be made by the user. But under the design proposed by the merged company, AT&T affiliates would have the power to decide whether these particular services would be "permitted" on the cable broadband network. Cable has already exercised this power to discriminate against some services. They have given no guarantee of non-discrimination in the future. Thus if cable decided that such services would not be permitted, the return to an innovator would be reduced by the proportion of the residential broadband market controlled by cable.

Lemley & Lessig at ¶¶ 59, 61.

C. Open Access Will Preserve Consumer Choice in Areas such as Niche Marketing and Filtering Through Competition Among Providers.

Closed cable broadband systems will eliminate consumer choice such as server-based filtering systems and variations among service offerings in important areas such as privacy.

Filtering software can help assure parents that their children will not be exposed to undesirable content.[10] It is most consistent with First Amendment values to allow parents as much control as possible over that choice. Closed access cable systems, however, deny parents the option of using "server-based" filtering, a technology which may prove to be the most effective mechanism to control what material is available to their children on the Internet. Development of such devices can, in the view of many, promote free speech by protecting children while permitting the Internet to provide unfiltered access for those who wish to receive constitutionally protected material which is offensive to others.[11]

While cable-affiliated ISPs offer their own software filtering option, this does not provide the same degree of security as a server which does not let targeted material through for ***any*** customer. For example, Dotsave.com, one of the increasing number of server-based filtered ISPS's, each of which varies in taste and philosophy, explains that "Filtering is done at our servers, making it difficult, if not impossible, for even the most advanced computer user to 'hack' through...." http://www.dotsave.com/faq.html. Families have a fundamental right to chose the protections for

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[10] This technology is not without controversy, especially when it has been employed in public fora. *See*, *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp.2d 552 (E.D. Va. 1998) (rejecting public library's imposition of filtering software).

[11] There are some 30 "server-side" ISPs's listed on one prominent directory. *See*, http://dir.yahoo.com/Business_and_Economy/Business_to_Business/Communications_and_Networking/Internet_and_World_Wide_Web/Network_Service_Providers/Internet_Service_Providers__ISPs_/National__U_S__/Filtered_Access/

their children that best comport with their own moral and religious standards. In an open model, parents can chose server-based filtering that best matches their particular beliefs.[12]

Moreover, competitive ISPs will open up broadband services to a broader range of users. They can market to, and provide better customer service for, citizens who might otherwise be left on the wrong side of the digital divide. For example, Cuban-Americans have different needs than Mexican-Americans and citizens of Puerto Rico. Cultural impediments may mean that a single ISPS with one Spanish language marketing staff will miss many of these new customers, leaving others outside the digital environment.

D. Open Access Will Encourage Deployment of Competitive Facilities to Provide High Speed Internet Access.

Not only does the closed access model restrict deployment of the leading technology, but Scott Cleland, a prominent industry analyst, argues that it prevents intermediate technologies that could fill market needs.

> And why is broadband service deployment so slow? Well, government policy only fosters convergence investment *within* industries (i.e., within regulatory re-gimes). It discourages *cross-industry* convergence investment by competitors. For example, the government inadvertently is discouraging the deployment of ISPS-marketed, hybrid modems that could rollout broadband service faster and cheaper to the national mass market than either cable modes or DSL. Hybrid broadband modems use the best of both plants' *existing capabilities*—cable's high speed downstream path with the telco's reliable upstream path … but only if regulators allow competitors access to both duopoly last-mile facilities, not just the telco pipe. Schizophrenic broadband policy if unchanged, preordains a duopoly market where

[12] For example, Christian parents concerned about access to sites they consider not merely pornographic, but also blasphemous, may use any of a number of Christian ISPS services offering server-based filters. *See, e.g.*, http://www.angelsonline.net, http://www.1lord.net. Mormon parents will likely prefer filtering more in line with their own religious beliefs, *see* http://www.lds.net. There is at least one service designed to meet the needs of Orthodox Jewish parents. See, http://www.the-kosher.net. By contrast, others may desire filtering with no religious orientation. *See, e.g.*, http://www.netjava.com/ChoiceNe.htm (offering non-sectarian filtering).

> most American consumers will have to wait years unnecessarily while cable upgrades its one-way broadband plant for two-way and telcos upgrade their two-way narrow band plant for broadband.

Scott C. Cleland, *Convergence Diverted*, (Legg Mason Precursor Research March 30, 1999) (cited in *Petition to Deny* at 96).

Moreover, the FCC's failure to act thus far has inhibited the deployment of other broadband technology. For example, as we explained in the Petition to Deny the AOL/Time Warner Merger, AOL's fear that it would be prevented from obtaining high-speed access to its customers prompted it, at least in part, to purchase Time Warner. AOL's deals with xDSL providers, obtained under the Commission's open access policies, were expected to drive deployment of this service. *Petition to Deny* at 27. For a thoughtful and important discussion of the how open access is more profitable for cable operators and for the economy as a whole, *see* Jeffrey Mackie-Mason, "Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle" (Nov. 5, 1999) found at http://www.-opennetcoalition.org/press/jmmwhi.pdf.

II. Open Access is Consistent with *Computer II* and *Computer III* Policies [¶¶ 11, 42].

In paragraphs 11 and 42, the *Inquiry* wrongly implies that the Commission's current inaction in the area of cable broadband open access is consistent with its historic decisions in the *Computer Inquiry* proceeding. As demonstrated clearly by several economists at Berkeley, and described in the CU, *et al.* Petition to Deny the AOL/Time Warner Merger, the inaction of the Commission is completely inconsistent with the *Computer Inquiry* decisions. *See Petition to Deny* at 79, n. 90 (citing Bar *et al.*).

In response to FCC Chairman Kennard's explanation that inaction was part of a "high tech" Hippocratic Oath to do no harm, these economists explain:

> ***While the FCC may believe such inaction simply continues its "unregulation" of the Internet, we should be clear that non-intervention constitutes instead a fundamental policy reversal.*** For thirty years the consistent FCC policy has been to foster competition, in particular cost-oriented access to essential local network facilities, and to promote an open network architecture. Far from non-intervention, this has required sustained policy intervention to keep the US communication infrastructure open. Having misread its own history, the FCC now risks misinterpreting Hippocrates: "First, do no harm" is not quite the same as "First, do nothing" and in this particular case, doing nothing is doing harm. The FCC's decision not to open a formal proceeding on access to high speed Internet service constitutes in effect a decision to permit access foreclosure. As such, it does not continue, but reverses 30 years of consistent policy direction.

Bar *et al.* at 3 (emphasis added).

They elaborate:

> [Internet] innovations were possible because the Federal Communications Commission decided in the 1960s that the emerging world of data networking should not be treated like telecom services. therefore, it exempted all forms of computer networking from much of telecom's regulatory baggage.... As a result it prevented telephone companies from dictating the architecture of data networks. .... Regulatory policy forced open access to networks whose monopoly owners tried to keep closed.

Bar *et al.* at 1.

They conclude, "The situation we face now is essentially similar to these past episodes. The question is obvious. The successful policy trend of the past thirty years has been to force competition and assure open access to the incumbent infrastructure. Why, now, reverse that successful policy?" Bar *et al.* at 10.

The *Computer Inquiries* are sometimes criticized for their difficulty of application. This difficulty arose because the definitions were technologically based, and did not include an economic component. But, at bottom, the technical definitions of enhanced and basic service were proxies for economic questions—which facilities or functionalities were owned and operated by monopoly providers with no incentive to supply those facilities on an economically rational basis? Was

availability of these facilities or services necessary to promote competition in other important areas?[13] These questions remain crucial today, and find voice in the policies inherent in recent decisions by Congress, in adopting Section 251 and 272 of the 1996 Act, and in decisions of the Common Carrier Bureau and the Commission prior to the 1996 Act. *See, e.g.,* 47 USC § 251(d)(2)(B); *IDCMA Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Service is a Basic Service, MO&O,* 10 FCC Rcd 13717 (1995). The Commission's authority to impose obligations such as those imposed under the Computer Inquiry proceedings remains intact to this day.

III. Cable Broadband Internet Access Meets Objective Criteria Defining When Regulatory Intervention is Appropriate [¶¶ 41, 42, 44].

In paragraphs 41-42 and 44, the Commission asks how it should identify the appropriate circumstances under which to intervene with open access policies. In CU *et al.*'s Petition to Deny the AOL/Time Warner merger, CU *et al.* discussed, using principles articulated by AOL and AT&T, the circumstances under which intervention is appropriate. Relying on AT&T's and AOL's own filings, we demonstrate the economic need for open access with respect to the cable industry, embodied in the particular analysis applicable to Time Warner. *See Petition to Deny* at 56-75 (quoting extensively from America Online, Open Access Comments, before the San Francisco Department of Telecommunications and Information Services (October 27, 1999) and AT&T Canada Long Distance Services Comments before the Canadian Radio-Television and Telecommunications Commission, Telecom Public Notice CRTC 96-36 (February 4, 1997).) Based on AT&T's and AOL's filings CU *et al.*

[13] *See* Lessig & Lemley at ¶33 ("The fundamental economic goal of the FCC in deregulating telephony is to isolate the natural monopoly component of a network—the actual wires—from other components in which competition can occur.")

described the factors that would justify intervention:

> (1) vertical integration between access and content, (2) market power in related markets, (3) paucity of alternative facilities, (4) the essential nature of access, (5) a need to ensure openness in the design of the architecture of the network, (6) stimulation of investment by increasing services, (7) the high cost to consumers of switching technologies, (8) bundling of monopoly and competitive services.

Petition to Deny at 10.[14]

In that Petition, CU *et al.* explain in detail the various economic harms wrought by that merger. In particular, at pages 49-76, CU *et al.* discuss the problems caused by vertical market power, the market power held by Time Warner as a cable company with significant interests in content, and the related problem of bundling monopoly and competitive services, items (1), (2). In that *Petition* we also explain the high cost to consumers of switching technologies, item (7):

> Closed proprietary products such as e-mail, instant messaging, buddy lists, calendar management and keyword search engines, have become the basic utilities of Internet communications and usage. Consumers hesitate to give these up, since changing ISPs requires significant changes in identification (e-mail address), cuts the consumer off from communities of interest (IM and buddy lists), or requires significant learning costs (new keyword searches and calendar management routines). These interfaces are the sticky features that glue the customer to the service provider.

Petition to Deny at 31 (footnotes omitted); *see also* Bar *et al.* at 16-20 (providing quantitative and qualitative analysis demonstrating the difficulty of switching broadband providers).

In these comments, *supra*, we review how open design principles are critical to the success of the Internet, item (5), *see* section I.B, and how open access will stimulate investment, item (6), *see* section I.D.

CU *et al.* discuss the essential nature of access and its similarities to other Commission

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[14] In the *Petition to Deny* we included an additional item "the inability of narrowband to compete with broadband" but this item is subsumed within item (3), paucity of alternative facilities, and item (4), essential nature of access.

policies, particularly those in the *Computer Inquiry* proceedings above, at section II. Of particular relevance to this point is that, in its review of the AT&T/MediaOne merger, the Department of Justice has found that broadband access and narrowband access are not substitutable for one another, relevant to items (3) and (4), the paucity of alternative facilities and the essential nature of access. The Department of Justice found that the relevant product market for analyzing the AT&T/MediaOne merger was the "market for aggregation, promotion, and distribution of broadband content and services." *DOJ AT&T/MediaOne, Amended Complaint* at ¶ 25. DOJ found that narrowband content and services was not substitutable for narrowband content and services. *Id.* at ¶¶ 22, 25-27. As explained above, the Internet's content cannot be segregated to second-class status as the new market for broadband content takes precedence.

IV. Proposed Elements of Open Access [¶¶ 26-31.]

In paragraphs 26-31 the Commission generally asks for a definition of "open access" and asks whether voluntary agreements negotiated in the free market will produce open access. The CU *et al.* Petition to Deny the AOL/Time Warner Merger laid out a number of policies that could be used to keep communications networks open. *See Petition to Deny* at 12-19, 145-154. These suggestions demonstrate that a highly complex understanding of the policy and regulatory elements necessary for open access have already been developed and are ready for full analysis in a rulemaking. Many of these proposals draw upon principles embodied in Sections 251 and 252 of the Communications Act.

The harms that these policies are intended to address are evident from our critique of the agreements already negotiated by AT&T and Time Warner, as addressed in the next section, *see infra* section V. Synthesized from the *Petition to Deny* and other documents referenced specifically

below, the critical elements of open access to consider are:

- Network owners shall provide any requesting Internet Service Providers nondiscriminatory access to its broadband Internet transport services (unbundled from the provision of content) on rates, terms and conditions that are at least as favorable as those on which it provides such access to itself, or its affiliates, or to any other person. This nondiscriminatory access must extend to:
    - all business and operational support systems and/or interfaces so that performance levels and processing time will not favor the affiliated ISPS
    - all ISPs regardless of affiliation, content, applications, functionality or type
    - adopting caching or replication policies, installing firewalls, protocol masking, extra routing delays or bandwidth restrictions that will affect the content a customer may access
    - timely notification of any new network or operational interface
- Network owners must allow competitors nondiscriminatory access to their broadband distribution network any technically feasible point, in the most efficient manner possible, and on terms that are at least technically and economically equivalent to those provided by the network owner to itself or affiliates or partners in terms of scope, quality, and price.
- Network owners must not implement any non-standard, proprietary interfaces; technical limitations must be adopted according to an agreed-upon standard.
- Network owners must provide "broadband Internet access transport services" which is the transmission of data between a user and his Internet service provider's point of interconnection with the broadband Internet access transport provider's facilities.
- Open access also should include policies that will promote diversity of content, robust competition, and localism:
    - The network operator should ensure that at least one "unrestricted" ISPS (an ISPS that does not provide content) is available on its network.
    - Access for local and noncommercial ISPs should be made available in proportion to network capacity.
    - Network owners should make access available on a variety of terms and conditions to meet the needs of ISPs of different types who have different needs and business models.

- The network operator shall support as many ISPs as technically possible and shall commit to the research, development and deployment of technologies to maximize the functionalities available and the number of ISPs that can be supported by the network.

- ISPs should be able to compete effectively against the network owner:
  - Pricing must allow consumers to choose any ISPS they want without being required to pay for or go through the cable-affiliated ISPS.
  - rates for ISPS access must prevent network owners from engaging in predatory pricing or cross-subsidization of their affiliated ISPS.
  - The Commission should require a cost basis for charges from network owners to unaffiliated ISPs. The Commission can utilize the existing leased access rates for cable channels, not to exceed $10 per month. (See NorthNet Filing, CS Docket No. 00-30 at 12-13)
  - Unaffiliated content providers should be allowed to resell (and therefore bundle) the cable programming to create a complete bundle.
  - Network owners that are affiliated with or have joint marketing arrangements with other providers should also be required to enter into non-disclosure agreements with nonaffiliated ISPs to preserve confidential data.
  - Network owners should not interfere in the relationship between the unaffiliated ISPS and its customer in any way, including the boot screen, billing, marketing, electronic transactions, privacy and customer termination policies.

- The open access guarantees should be enforceable through a right of action by an aggrieved competitor or by a state or local regulatory agency. The Commission must explicitly reserve the right to prevent discrimination on its own motion.

V. So-called "Market-Based" Agreements are Not Sufficient [¶¶ 37, 39].

In paragraphs 37 and 39 the Commission seeks comment on what it terms "market-based" open access initiatives. CU *et al.* are compelled to point out that ***none*** of the initiatives mentioned are "market based." Each of these agreements was adopted specifically in response to a regulatory initiative or inquiry. Specifically, the AT&T/Mindspring discussions were initiated at the request of Chairman Kennard; the AOL/Time Warner Memorandum of Understanding was drafted in order

to speed regulatory review of that merger at the FCC; and the recent spate of AOL negotiations are in response to the Federal Trade Commission's apparent position that it will not approve the AOL/Time Warner merger until such agreements, presumably with competition-enhancing terms, are achieved. John R. Wilke, "FTC Seeks AOL-Time Warner Conditions Sealed With a Contract, Not Assurances" *Wall Street Journal* at A3 (Nov. 10, 2000) (stating that the Federal Trade Commission will not approve the AOL/Time Warner merger without at least one signed contract between Time Warner and an independent ISPS).[15] Each of these agreements posses significant flaws.

A. AT&T/Mindspring

Media Access Project President and CEO Andrew Schwartzman participated in the discussions leading up to the AT&T/Mindspring agreement. When that agreement was announced, Mr. Schwartzman explained the flaws in that agreement in a December 6, 1999 letter to Chairman Kennard <http://www.mediaaccess.org/filings/MAPLTR.pdf> (*See attached*). In addition, in the Petition to Deny the AOL/Time Warner merger, CU *et al.* described additional flaws with the AT&T agreement. The agreement makes several concessions, also incorporated in the Time Warner/AOL MOU. It:

- Promises consumers a choice of ISPs, without having to subscribe to an affiliated ISPS.
- Promises to offer ISPs a range of Internet connections at different speeds and prices with functionality that is comparable to other high speed systems, "subject to any technical constraints particular to, or imposed upon, all ISPs using AT&T's cable system to deliver

[15] The agreement announced between Juno and Comcast, see Goodman & Klein, "Comcast, Juno Make Deal to Sell Net Access," *Washington Post* at E4 (Nov. 29, 2000), does not contradict this assertion. Not only did this agreement occur only a few days before the comments in this regulatory proceeding are due, but its confidential terms give CU *et al.* no comfort that Juno will not alter its behavior and strategic efforts because it will be fully dependent upon Time Warner's good grace for its continued success. Without regulatory guarantees, Juno will most assuredly agree to many terms and conditions that will undermine its independence from Comcast.

high-speed Internet access."

- Promises cable modem service will support Internet protocols and customers will be able to configure the service to support the customers' own choice for a "first screen" and bypass all proprietary content of a network affiliated ISPS.

- Promises that consumers have access to all content and ISPs, subject only to reasonable technical limitation that may be necessary to preserve a reasonable level of service for other customers that are also using the service (i.e., limitations on "bandwidth hogging").

See Petition to Deny at 143-45.

Unfortunately, it also:

- Allows to hide behind an "exclusive contract" to delay introduction of broader access for up to two and a half years, and perhaps much longer, AT&T owns 58% voting control of Excite@Home. Its failure to provide open access more quickly is like saying that on January 1, 1984, the day AT&T divested the local phone companies, there was competition in long distance services.

- Limits open access to merely a choice among ISPs, and does not guarantee that unaffiliated ISPs have access to the cable network under the same terms and conditions, and at the same rates, that access is available to affiliated ISPs.

- Allows AT&T to restrict offerings to those which its affiliate chooses to provide.

- Requires ISPs to use AT&T transport facilities thus permitting content-based discrimination in favor of preferred content providers and commercial partners, which is utterly at odds with what the Commission expects of all other telecommunications services. Moreover, it particularly penalizes ISPs which own, or have long-term leases for, transport facilities, and which may have built their own regional nodes.
- Fails to guarantee that customers can purchase Internet access at commercially reasonable rates without having to buy a bundled "package."

Letter from Andrew Jay Schwartzman, President & CEO, Media Access Project to Chairman William E. Kennard, Federal Communications Commission (Dec. 6, 1999).

In addition, AT&T was less forthcoming on the commercial relationships. AT&T will negotiate prices for different levels of speed, but provides no principles for arriving at a reasonable price and no enforceable assurances about the quality of service. AT&T will give independent ISPs

the opportunity to offer service to consumers over AT&T's facilities, but it retains immense control over the nature, quality and cost of the services it will allow to be sold and the manner in which they will be marketed to consumers. For example, AT&T declares that any such opportunities will be subject to terms and conditions to be agreed upon by the parties covering: pricing, billing, customer relationship, design of start page, degree of customization, speed, system usage, caching services, co-branding ancillary services, advertising and e-commerce revenues, and infrastructure costs.

AT&T will allow independent ISPs to market to cable customers who have not designated an ISPs. However, AT&T requires the ISPs to negotiate with AT&T how that will take place by stating that the opportunity to market must be "through means mutually agreed upon." It is not clear that independent ISPs would be allowed to compete for AT&T's Internet customers.

Most recently, a description of AT&T's current market trial in Boulder, Colorado demonstrates AT&T's lack of commitment to true competition by ISPs leasing space on the AT&T network. *See* Peter S. Goodman, "AT&T Puts Open Access to a Test" *Washington Post* at E1 (Nov. 23, 2000) (describing AT&T icon that appears on competing ISP screens, among other open access concerns).

B. AOL/Time Warner

In its Petition to Deny the AOL/Time Warner Merger, CU *et al.* critiqued the AOL/Time Warner MOU. *See Petition to Deny* at 141-142. The AOL Time Warner commitment can be summarized roughly as follows:

- AOL Time Warner commits to provide consumers a broad choice among multiple ISPs, consistent with providing a quality consumer experience and any technical limitation.

- AOL Time Warner pledges to negotiate commercial agreements with unaffiliated ISPs that will not discriminate in terms of access or operation of the network against ISPs who are not affiliated with AOL Time Warner.

The MOU offers some details of the non-discriminatory commercial relationship it contemplates:

- Consumers will not have to purchase service from an affiliated ISPS in order to obtain broadband Internet access over AOL Time Warner systems.

- Unaffiliated ISPs will be allowed to have the only direct relationship to the customer for broadband Internet service.

- Unlike AT&T, ISPs will be allowed to connect without purchasing broadband backbone transport.

AOL's offer to conduct commercial negotiations will cover nondiscrimination in additional area of commercial relationships and operation of the network including speed of service, marketing commitments, nature of service, tier of service and whether an ISP wishes to "partner" with AOL/Time Warner. AOL/Time Warner also recognizes that in addition to nondiscrimination in commercial and operational relationships, there are also potential problems in discrimination against applications and it agrees not to prevent the provision of streaming video by unaffiliated ISPs.

AOL/Time Warner appears to recognize the legitimacy of civic discourse goals. AOL/Time Warner have made two commitments in this regard.

- They commit to partnering to promote national, regional or local services in order to facilitate the ability of consumers to choose among ISPs of different size and scope.

- They will not allow selective offering of service that "redlines" a portion of an AOL/Time Warner cable system.

Although the AOL Time Warner commitment goes beyond any made by other cable companies, it falls well short of what is necessary to preserve the open communications that has typified the narrowband Internet:

- The policies, terms and conditions offered by AOL Time Warner are inadequate and AOL Time Warner continues to insist that this is all voluntary, which means that there is no effective enforcement mechanisms.

- Details of implementation are totally lacking.

- Without legal enforceability of the agreement its commercial interests make them untrustworthy. AOL Time Warner is shutting competitors out wherever the law does not prevent them from doing so.

Moreover, the details of Time Warner's proposals recently came to light in a detailed filing submitted by NorthNet. This filing demonstrated significant flaws with the "voluntary" negotiation process. NorthNet explained the flaws with the Time Warner term sheet:

- Despite promises to negotiate in good faith, the term sheet explicitly eschews any obligation to negotiate in good faith by Time Warner.

- In order to obtain a term sheet, an ISPS was forced to disclose information about itself:

  - product offering
  - whether they are currently offering broadband services
  - the number of subscribers currently served
  - how long company in business
  - ownership of company
  - basic financial information
  - current service areas

- The term sheet required a non-refundable $50,000 deposit. Total costs of contracting for necessary infrastructure at Time Warner's headend, transport, and backbone services total $700,000.

- The home page is subject to Time Warner's approval and Time Warner has the option for an "above the fold" "prominent availability" without limitation as to content, applications, service or functionality.

- Time Warner must agree to alter its privacy policies to the extent that an ISPS's privacy policies are inconsistent with and in some way a limitation on Time Warner's current and anticipated business use of information.

- "Each of ISPS and TWC will sell the Service and will determine the pricing of the Service when sold by it."

- Time Warner will have sole discretion over subscribers termination policies, include without limitation for non-payment.

- Time Warner will not be required to provide QoS [Quality of Service] support for telephony or video streaming for the service. QoS may be provided upon request and at an additional cost.

- To the extent an ISPS wishes to offer any functionality which is outside the scope of the Network Architecture or requires an operator to acquire equipment or software or implement a change in the way the operator processes, TWC shall have the right to approve such functionality, and the ISPS shall be obligated to reimburse Time Warner for its direct, out-of-pocket costs in implementing such new functionality.

- Time Warner's requires 75% of revenue, or a minimum of $30 per month, for Time Warner.

- Time Warner may package its ISP's service with others but competing ISPs may not.

- Time Warner's will only optimize other ISPs' services for personal computers, but not for other devices, such as set top boxes.

- Time Warner does not allow ISPs to bundle their offering with cable television service.

- Time Warner takes 25 percent of all ancillary revenues generated by the ISPS for "advertising, transactions, communications, premium services, e-commerce, web hosting, and other fees."

- Time Warner keeps all revenues generated by the independent ISPs for Time Warner.

NorthNet Filing at 4-8.

Even under regulatory duress, cable operators have not demonstrated a willingness to negotiate agreements with unaffiliated ISPs that serve competitive and First Amendment goals.

CONCLUSION

CU *et al.* believe a full rulemaking proceeding is long overdue. The harm and uncertainty from the Commission's delay is only increasing. CU *et al.* look forward to participating in a full proceeding where the significant progress that has already been made in developing economic, legal and regulatory models can be used to serve First Amendment values, protect consumers, and preserve the open character of the Internet.

Respectfully submitted,

Cheryl A. Leanza

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December 1, 2000

Attachments

September 15, 1998

Chairman William E. Kennard
Federal Communications Commission
Washington DC 20554

Dear Mr. Chairman:

We are writing to seek your assurance that the FCC will guarantee that Internet access obtained via cable television systems will provide citizens with the same freedom and choice presently available on Internet services obtained via more traditional switched telephone networks.

This week, the Commission is receiving the first written comments on its inquiry into how it can best facilitate broad and rapid public access to advanced telecommunications capabilities. Among the questions it will consider are those which your Office of Plans and Policy ("OPP") has identified in its newly-released working paper, *Internet Over Cable: Defining the Future in Terms of the Past*. OPP's timely and thoughtful analysis underscores our concern that the promise of the Internet and advanced data technologies it employs will not be fully realized without affirmative involvement of the FCC.

The dazzling evolution of the Internet's freewheeling and innovative qualities is, in large measure, attributable to the fact that the Internet has been deployed on the nation's public switched telephone network, which is provided according to common carrier principles. Every user has been entitled to the same access on the same terms; access providers have been precluded from content-based or economic discrimination.

The Commission's decisions regarding the policies under which cable Internet services will be provided will have important consequences. Although the Commission is constitutionally and statutorily mandated to nurture free expression and free commerce, some cable operators providing Internet access want to retain control over the content their Internet subscribers can receive. They view the cable/Internet interface as private real estate: they will rent space only to the highest bidder or, even worse, only to those whose content meets their political, artistic, or social standards. Moreover, if cable-provided Internet access is defined as a form of cable television service, it may well be subject to franchise fees or other state and municipal taxation.

We are among those who believe that the wonders of the Internet have developed because of, not in spite of, the common carrier policies the FCC has employed. Whatever choices are made for the future must provide the benefits of competition while retaining the goals of common carriage -- openness, non-discrimination, and choice.

Sincerely,

Cheryl A. Leanza
Staff Attorney

Andrew Jay Schwartzman
President & CEO

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Executive Director

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CENTER FOR MEDIA EDUCATION

July 29, 1999

Chairman William Kennard
Federal Communications Commission
445 12th Street SW, 8th Floor
Washington, DC 20554

Dear Chairman Kennard,

We are writing to follow up on our meeting with you and your staff on June 21, 1999, concerning the question of open access to the Internet delivered through cable infrastructure. We believe that current FCC policy, if unchanged, would strip the Internet of the very qualities that have made it one of the most powerful vehicles for expression and economic growth ever created.

When we met, we discussed what it meant for a cable modem platform to be "open." At that time we expressed strong concern that the closed nature of the cable platform would have a significantly adverse impact on content unaffiliated with the cable operators. We said that cable broadband operators, by exerting total control over the content, the conduit, and the technology, would be able to directly discriminate against unaffiliated content. In response, you expressed confidence that the cable modem platform was "open" to all content and assured us that cable companies were committed to allow "click through" access to all Internet content.

We write now to provide further information that makes clear why the "click through" commitment made by cable broadband providers is illusory and cannot be substituted for a real policy ensuring an open Internet. Based on our initial findings, we believe the FCC has placed the future of the Internet in jeopardy.

As currently designed and deployed, "click through" access in cable-based broadband architecture does not guarantee non-discriminatory access for independent ISPs.

First, the cable broadband networks can be intentionally manipulated to provide wide bandwidth to the user for commercially affiliated content, but significantly less bandwidth for generic and cable-unaffiliated Internet traffic. One might envision the bandwidth offered by the cable modem network as a funnel, with the wide end being last mile bandwidth and the narrow end being the connection to the Internet. The cached content of the service provider affiliates is located in the middle of the funnel, while non-affiliated sites have no means to bypass the bottleneck. According

to anecdotal accounts, cable modem users typically have access to Internet content at speeds below 200 kb/s while their access to cached content is often at speeds exceeding 1 mb/s (5 times as fast).

Furthermore, using Quality of Service controls (QoS), cable providers may discriminate against non-affiliated content in even more distressing ways. For example, non-cached streaming video could be limited using QoS to 50 kb/s (even though the total Internet bandwidth available might allow every user to have 200 kb/s).[1] This effectively limits that streaming video to a small window at a dozen frames per second (low quality, jerky video). At the same time, cached streaming video, unavailable at any price except to cable operator's chosen affiliates, comes to users at 1 mb/s, allowing full screen, TV quality video. In essence, cable companies have the ability to crimp the hose based on whether content is viewed as competitive in any manner.

As @Home has already done, it can limit transmission of streaming video from outside sources to 10 minutes. In fact, Cisco's "Controlling Your Network" discusses how cable operators can "prevent outside content providers from disrupting the cable network by delivering broadband content without authorization granted by the MSO."[2]

We understand that there are appropriate and legitimate needs for quality of service controls. However, without oversight and proper incentives, such controls can and will be abused. You may have read recently that the @Home service instituted (without notice to its customers) a change in its service which it referred to as the "ONAdvantage Upstream Enhancement."[3] This supposed "enhancement" restricts members of the public from uploading materials faster than 128kb/s (previously, users were not restricted and some users reported upload speeds of approximately 1mb/s - 8 times as fast as what @Home offers now). Although this limitation is troubling in and of itself in a medium where all users can be producers as well as receivers of information, we were intrigued with the software that makes such controls possible. This practice decisively undercuts the cable industry's fanciful claim that their network is a "shared" one without the ability to assign set amounts of bandwidth to certain users. It thus belies their arguments that a so-called "bandwidth hog" problem precludes opening the network to competitive ISPs. Not

[1] Using QoS controls, streaming video and other content can be selectively limited so that video from site A is available at high bandwidth while video from site B is available at only a fraction of the speed of site A. Obviously, this gives content from site A a tremendous advantage over content from site B.
[2] "Controlling Your Network – A Must for Cable Operators." Cisco White Paper (1999).
[3] A copy of the internal @Home memo detailing this service was posted to the comp.dcom.modems.cable newsgroup on June 8, 1999.

only is that not the case but the cable operator has the tools to exert exacting control over the upstream and downstream content.[4]
The cable-based architecture that is being deployed will support sophisticated and subtle discrimination against non-affiliated ISPs that will not be prevented by promises of "click through" access, and will be extremely difficult for the Commission to detect and eliminate.

However troubling these examples are, they are just the tip of the iceberg in how the Internet is being fundamentally reconfigured to serve the cable industry's monopoly business model. While consumers may be able to "click through" to unaffiliated content, they are not assured that the content they seek will be delivered at the same speed or with the same quantity or quality as affiliated content. As the Commission should know, the network architecture and software employed in cable broadband access can be manipulated to create artificial bottlenecks to unaffiliated content. This capability is real, not theoretical. Controls already in place are extremely sophisticated, allowing cable operators to "...isolate network traffic by the type of application, even down to specific brands, by the interface used, by the user type and individual user identification, or by the site address."[5] These network controls allow operators to police and limit particular kinds of network traffic based on policy decisions as to what priority different types of packets should receive.

Based on documents describing off the shelf equipment currently in place and other equipment now being deployed by cable internet service providers around the country (including, but not limited to, @Home and RoadRunner) we know that modern cable modem termination system (CMTS) equipment comes with numerous controls built in. Using modern CMTS equipment, cable system operators have networks that allow them to do the following:

- Limit upstream bandwidth for specific users or classes of users
- Limit downstream bandwidth for specific users or classes of users
- Restrict Internet bandwidth based on site address
- Partition and prioritize Internet bandwidth based on type of content, even according to brand
- Enforce policies they have developed that prioritize data service according to packet type (Web, e-mail, voice, video, etc.)

[4] These technologies are also becoming easier to put into place. For example, Cisco's products allow @Home and RoadRunner to update their controls remotely.
[5] "Controlling Your Network – A Must for Cable Operators." Cisco White Paper (1999).

As cable-based broadband architecture is being deployed, "click through" access does not prevent preferential marketing practices that favor affiliates and undermine independent ISPs.

The impact of this architecture on competition and the distribution of economic opportunities can not be overstated. Small entrepreneurs, especially those who have planned to use the Internet to target market niches based on cultural, ethnic, language or other characteristics, will be at a decisive disadvantage in seeking to challenge established competitors who can afford to purchase "preferred" or "exclusive" positioning from a cable ISP.
Indeed, Cisco makes clear in its document to cable operators distributed at the recent NCTA show, that its cable broadband network can be used to steer citizens to affiliated content and divert attention from the rest of the Internet. More specifically it claims the ability to limit the potential of unaffiliated e-commerce sites to conduct broadband transactions with cable customers. There are several ways in which this can be done.

As we noted above, crimping bandwidth is only one way in which competitors can be limited. Specific content, regardless of type, can be limited based on its origin. If a cable company decides that traffic from Yahoo! should be limited, they have the ability to do so. Similarly, specific types of content, regardless of its origin, can be limited as well. For example, if a competitor creates a new, more efficient technology for compressing video-but is not affiliated with the cable industry-cable ISPs can simply limit the bandwidth available to content of that type to an unusable level, effectively hamstringing any competitive content provider that would use that new technology.

As cable-based broadband architecture is deployed, "click through" does not prevent discriminatory pricing for independent ISP's or ensure fair pricing for consumers

The cable-based broadband architecture that is being deployed demands is wedded to a business model that is based on discriminatory pricing of access. The "click" in "click through" inevitably involves a charge for access that undermines the ability of independent ISPs to compete. The architecture is designed and deployed to ensure that the monopoly rents associated with access can be captured and maximized by the cable operator.

We are also concerned that the cable broadband architecture being put into place is being accompanied by a strategy to end "flat-rate pricing" to the Internet. As suggested by one major equipment vendor, "by collecting detailed statistics on the

quantity and type of data being sent by each customer, cable operators can break through the flat rate pricing model and bill for the true value of services used."[6]

These technologies are being developed by a number of different providers, including Cisco, 3Com, and Nortel, and have already been deployed in numerous locations by multiple cable providers.[7] Unless real open access is provided, consumers will soon discover not only that they have no choice in broadband service provider, but that their full access to the vast resources of the Internet has been limited as well. As you know we strongly disagree with your decision to engage in "watchful waiting" with respect to competition in the cable modem marketplace. But if you are to engage in "watchful waiting" it is critical to know precisely what you are watching.

It also concerns us that this is happening at the same time as the cable industry is undergoing massive consolidation under the AT&T umbrella. The combination of the historically closed video programming clout of these companies with a closed, discriminatory Internet access model is cause for grave concern. This represents a coordinated, national strategy on the part of the affiliated and/or closely aligned companies dominating the cable industry to a single, closed, discriminatory information medium. Since there is still, in most parts of the country, effectively no competition for cable modems or cable programming, the practices of the cable industry must be subjected to the strictest scrutiny.

We are troubled that the FCC's current policy of "watchful waiting" will, in reality, allow the future of the Internet to be placed at the service of the cable industry. To allow cable to proceed unfettered simply ignores the industry's well-documented history of thwarting competition, program access, and innovation.

Cable's data business model, combined with the capabilities of technologies already being deployed, and the industry's extensive anticompetitive history, require that the FCC change its current policy of "watchful waiting," and conduct an immediate full public inquiry. The inquiry should address the risks posed by this emerging model to both TV competitiveness and the vibrant marketplace of ideas that the Internet represents. Based on this inquiry, the FCC should articulate a clear "openness" policy for broadband deployment. Such a policy should create a

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[6] "Cable for a New World: A Cable Provider's Guide to Digital Broadband Development," Cisco Systems.

[7] Cisco's equipment, in particular, has seen wide deployment. Until recently, Cisco was the only CMTS provider certified as DOCSIS compliant – giving their products (which include these QoS controls) immense power vis-à-vis their competitors.

framework and a set of guidelines for ensuring a truly free and competitive broadband marketplace.

Sincerely,

Jeffrey Chester
Center for Media Education

Mark Cooper
Consumer Federation of America

Gene Kimmelman
Consumers Union

Andrew Jay Schwartzman
Media Access Project

Patrice McDermott
OMB Watch

cc: Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Michael Powell
Commissioner Harold Furchtgott-Roth
Senator John McCain
Senator Ernest Hollings
Representative W.J. “Billy” Tauzin
Representative Edward Markey

December 6, 1999

Chairman William E. Kennard
Federal Communications Commission
Washington, DC 20554

Dear Mr. Chairman:

Several months ago, you asked me to meet with representatives of AT&T, Excite@Home, MindSpring, Atlanta Mayor Campbell and the FCC's Local and State Government Advisory Committee with the goal of reaching agreement on a definition of "open access" in the cable broadband environment. I am among the three of these six people you called upon who have chosen not to sign the letter being sent to you today.

In dozens of hours of conversation over the last four months, I tried to work constructively towards that objective. So did the others. The discussions were candid and sincere. I believe the participants acted in good faith at all times.

It is with regret that I advise you that what AT&T describes in the letter being sent to you today by three of the six members of the group IS NOT "Open Access."

Even so, I promised you that I would try to be flexible, and I had remained willing to endorse AT&T's "voluntary" undertaking as an important step in the right direction.

However, a few weeks ago, I reluctantly concluded that I could not sign the letter I had helped to draft, even if I had also presented a separate statement of my own views. Here is why:

- AT&T was unwilling to discuss, much less consider, several criteria which are essential to insuring that cable operators will not abuse their monopoly position to favor certain content and certain business partners. This inhibits the Internet's current role as a renewable source of constant innovation, economic growth and free expression.

- With the unexplained withdrawal of Excite@Home from the discussions, there was no longer any assurance that Excite@Home would cooperate in the planning and implementation of AT&T's commitments, or in preparing for broader access in the "post exclusivity" period.

- Widespread mischaracterization of the recent FCC staff report on broadband access, including misleading statements by a high level Commission official at a public meeting I attended three weeks ago, led me to realize that the letter could be misused to make it seem that AT&T has in fact agreed to provide "open access."

Nonetheless, there are important breakthroughs in the letter. AT&T's willingness to make its systems more available to competitors is a significant breakthrough. While I do not doubt the sincerity of those making these "voluntary" promises, the simple fact is that the high turnover of top

officials at AT&T requires that you obtain binding commitments. Accordingly, I ask that you make AT&T's compliance with these undertakings a condition of any transfer of ownership MediaOne cable systems to AT&T.

I have been inundated with queries since self-serving versions of the letter were leaked to the press. Thus, I will use this letter as a vehicle to summarize my concerns. I ask that you place this letter, along with all correspondence you receive from other of the participants, in html format on the Commission's Broadband Internet Access webpage: http://www.fcc.gov/broadband/
I will also post this letter on Media Access Project's website: http://www.mediaaccess.org
Interested citizens - and Commission staff - can learn more about my views on the subject *via* links to the compendium of broadband materials contained at: http://www.nogatekeepers.org

I would stress that I have not seen the final version of the AT&T undertakings, as I withdrew from the talks two weeks ago. Based on my knowledge of the drafting, as well as leaks which reporters have received from what they describe as knowledgeable parties, these are my comments:

1. Although AT&T owns 58% voting control of Excite@Home, it is hiding behind an "exclusive contract" to delay introduction of broader access for up to two and a half years, and perhaps much longer.

AT&T says it will not open its systems until it is freed of existing contractual commitments. In the case of Excite@Home, this could be at least two and a half years. AT&T has been unwilling to disclose when MediaOne's exclusivity with the RoadRunner ISP will expire; some of these agreements evidently run much longer than the Excite@Home contracts.

These contracts are in my opinion, unlawful. That aside, AT&T controls the voting stock in Excite@Home and appears to be acquiring 50% operating control of RoadRunner. It can provide access much more quickly. The failure to do so means that AT&T will be able to retain a stranglehold on the prime internet access customers for many years to come.

To call this open access is like saying that on January 1, 1984, the day AT&T divested the local phone companies, there was competition in long distance services. The Commission should not allow a new monopoly to be created as it "watchfully" waits for competition.

2. Open access requires more than a choice of ISP's.

Open access requires that cable operators provide competing ISP's with full access to their systems under the same terms and conditions, and at the same rates, that access is available to affiliated ISP's. An operator should not be able to restrict offerings to those which its affiliate chooses to provide.

The characteristics and benefits of open access are described in *Keeping the Information Superhighway Open for the 21st Century,* a paper to be released today by the Consumer Federation of America: http://www.consumerfed.org/internetaccess/keeping1299.htm

3. Requiring ISP's to use AT&T transport facilities permits content-based discrimination in favor of preferred content providers and commercial partners, and threatens to undermine the most valuable characteristics of the Internet: low entry barriers for nascent entrepreneurs, free expression and serendipitous innovation.

Throughout the discussions I attended, AT&T was unwilling to agree to let ISP's have access to connections at the cable head end. It instead insisted that ISP's use AT&T transport facilities all the way to the Internet backbone. The absence of an affirmative statement that ISP's can connect at the head end is profoundly anti-competitive, and utterly at odds with what the Commission expects of all other telecommunications services. It particularly penalizes ISP's which own, or have long-term leases for, transport facilities, and which may have built their own regional nodes.

Professors Lawrence Lessig (Harvard Law School) and Mark Lemley (University of Texas Law School) have described how the closed cable television model is antithetical to the core characteristics of the Internet as we know it today in comments recently filed in the AT&T/MediaOne merger proceeding: http://cyber.law.harvard.edu/works/lessig/MB.html

Professor Jerome Saltzer of MIT has described five kinds of content control in his newly-published paper http://web.mit.edu/Saltzer/www/publications/openaccess.html

Free expression includes the right not to receive access to unwanted material. Your strong support for the television v-chip ought to impel you to examine how closed access does not permit parents to use effective "server side" filtering by subscribing to "family friendly" ISP's. This problem is discussed in the brief Media Access Project co-authored in the Ninth Circuit Portland case: http://www.mediaaccess.org/filings/index.html#anchor44776

3. AT&T has abandoned its claims that it is not technologically feasible for cable operators to provide access to multiple ISP's.

Even as technologists at the highest levels of AT&T and Excite@Home were representing to me that there is no technological impediment to providing citizens with access to multiple ISP's, their lobbyists have continued to argue the contrary position before numerous state and local legislative and regulatory bodies. Indeed, a significant factor in my decision to withdraw from the talks you asked me to attend was the claim contained in an October 15, 1999 article by Excite@Home's General Counsel that "The technology simply does not yet exist to allow multiple ISPs to share a coaxial cable on a commercial basis."[1]

Since AT&T says it can provide this access for Excite@Home customers on AT&T cable

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[1]Daniel Pine, *Let the Feds Regulate*, at
http://www.thestandard.com/article/display/0,1151,7017,00.html
A forceful rebuttal can be found in a two part article, Professor Lawrence Lessig, *Cable Blackmail*, at http://www.thestandard.com/article/0,1153,5198,00.html
and *The Cable Debate, Part II*, at http://www.thestandard.com/article/0,1151,5621,00.html

systems and RoadRunner customers on MediaOne cable systems, all the other Excite@Home and RoadRunner partners should be able to do so as well.

4. Open Access brings a better financial return for cable operators.

Competitive ISP's will generate more revenue for cable operators. They can market to, and provide better customer service for, citizens who might otherwise be left on the wrong side of the digital divide. For example, Cuban-Americans have different needs than Mexican-Americans and citizens of Puerto Rico. Cultural impediments may mean that a single ISP with one Spanish language marketing staff will miss many of these new customers, leaving others outside the digital environment.

A thoughtful and important discussion of the how open access is more profitable for cable operators and for the economy as a whole is contained in a newly-released paper by Professor Jeffrey McKie-Mason of the University of Michigan, at http://www.opennetcoalition.org/press/jmmwhi.pdf

5. AT&T has been unwilling to make a written commitment that customers can purchase Internet access at commercially reasonable rates without having to buy a bundled "package."

Failure to permit independent purchase of Internet services threatens to expand the digital divide.

My Request: Open-Minded and Objective Reevaluation of Voluntary Access Plans

In accepting your request to meet with AT&T and others, I placed at risk my relationships with my clients and my professional colleagues. I have had several very emotional conversations in the two days since word of my involvement was leaked to the press, and one client has directly accused me of a breach of trust.

I knew this would be difficult, but I was willing to take the risk. I am proud that I tried to advance the public's agenda, and I am confident that I will be able to convince my colleagues that I did the right thing.

This experience impels me to make a request of you. I ask that you undertake a candid and zero-based review of what AT&T and, more importantly, other cable operators and their trade associations, say about open access in the days and weeks to come. This may require you to do something I know does not always come easily to you - to change your mind.

Depending on what you find, I ask you to reevaluate your unwillingness to use the Commission's legal authority to require non-discrimination in providing broadband cable internet services. For example, if one or more of the major cable operators remain unwilling to agree that affording access to multiple ISP's at the cable head end is not technologically feasible, or that they are unwilling to make binding commitments not to abuse caching and other quality of service standards to favor certain content at the expense of free expression and economic growth, you need to ask yourself if marketplace forces alone can influence those monopoly cable operators to follow a different course.

I will do the same thing. I will approach my own inquiry as open-mindedly as I can. I know you will, too.

Sincerely,

Andrew Jay Schwartzman
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